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Supreme Court of the United States

October Term, 1977

No. 77-1728

MILTON SHIFFMAN,
Petitioner,

V.

UNITED STATES
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MILTON SHIFFMAN,
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PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Milton Shiffman, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 4, 1978.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, not yet reported, appears in the Appendix. (A1-10).

There was no formal opinion of the District Court for the Eastern District of Michigan. Excerpts from the transcript of the district court hearing are reproduced in the Appendix. (A11-12).

JURISDICTION

The opinion and judgment of the Court of Appeals for the Sixth Circuit were dated and entered on May 4, 1978, and this petition for certiorari was filed within the time prescribed by law. This Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Whether the long-standing Fifth Amendment "institutional entity" doctrine, reaffirmed in *Bellis* v *United States*, 417 US 85 (1974), reaches limited financial records of two tenants in common (along with their wives), of a single piece of land, merely because both co-tenants share ownership and access to these records.

2. Whether the privilege against self-incrimination excepts documents of an institutional entity under the *standard* consistently applied by this Court or excepts all documents in which more than one person shares ownership or access rights under the novel per se *rule* established by the court of appeals.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment, in pertinent part, provides:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . "

STATEMENT OF THE CASE

The grand jury sitting in the United States District Court for the Eastern District of Michigan issued a subpoena dated January 20, 1978, to "Dr. Milton Shiffman or any other authorized representative — G and S Investment"* requesting (1) cash receipts journal, (2) cash disbursements journal, (3) bank statements, (4) cancelled checks, (5) deposit forms, (6) general ledger, and one other specification not relevant to this appeal. The subpoena was returnable February 8. Shiffman, through his counsel, advised the United States Attorney he would not comply with the subpoena, relying instead on his Fifth Amendment privilege against self-incrimination. The actual appearance was waived.

The U.S. Attorney filed a motion in the district court for an order compelling compliance. The court held a non-testimonial hearing on February 24, in which Dr. Shiffman's lengthy affidavit was the only document filed that contained facts of admissible evidence. The court granted the motion to compel compliance from the bench.

The order to comply with the subpoena was issued March 8 requiring Dr. Shiffman's appearance March 9. Dr. Shiffman appeared before the grand jury and again asserted his Fifth Amendment rights.

A motion for adjudication of contempt was filed March 10, noticing a hearing for March 14. The parties filed a stipulation reciting that Dr. Shiffman's defense to the contempt would be the same Fifth Amendment grounds.

The district court entered an order of contempt and confinement on March 17. Dr. Shiffman forthwith filed a

* Technically, "G & S Investments," cited here as G & S.

notice of appeal. The court then entered an order for the release of Dr. Shiffman on his personal recognizance pending appeal, the government having stipulated, "[I]t does not appear that the appeal is frivolous or taken for delay," pursuant to 28 USC 1826.

The appeal was perfected in the United States Court of Appeals for the Sixth Circuit. The court of appeals filed an opinion and judgment affirming the district court on May 4, 1978.

The uncontradicted affidavit of Dr. Shiffman sets forth these facts. In 1972, Dr. Shiffman and one Hyman B. Gordon each owned an undivided one-half interest as tenants in common in certain real property in Whitmore Lake, Michigan. That year they each deeded a portion of their interest to their wives, so that they all held as tenants in common. Recently, Dr. and Mrs. Shiffman deeded their respective interests to revocable living trusts they established in which they are the respective trustees.

Shiffman and Gordon, in late 1974, opened a bank account under the style G & S. The sole purpose of the account was to segregate transactions relating to the ownership of the real estate from other bank accounts maintained in individual names. The only activity of the bank account is to receive owner's income for the real property and to disburse such income. The only disbursements are to the mortgagee for the mortgage payments and to the tenants in common. Both Shiffman and Gordon have authority to issue checks from the account, but only for these two purposes.

G & S has no activity whatever other than the assumed name bank account for the limited purpose just described. G & S has no business office and has never had one. It has no telephone number, no stationery, and does not advertise. It has no employees, nor has it ever had employees. It files no separate tax return. It has no written agreement of any kind except for the bank account mentioned above.

G & S is not a partnership, does not hold itself out to the public as a separate institutional entity, nor does it so hold itself out to those few persons or entities from whom it may receive funds, or to whom it may disburse funds.

A nursing home is operated on the involved real estate by a separate corporation. The records of that corporation were not the subject of the subpoena.

The district court, without an express finding that G & S is an

organized, institutional entity, rejected the Fifth Amendment claim on the ground that the records were not wholly personal.*

The court of appeals held:

> "Though there was no organized institutional activity equivalent to the usual business activity of the corporation or partnership, the records of G & S undeniably reflect transactions which were not wholly those of Dr. Shiffman.
>
> • • •
>
> "We conclude that to the extent Dr. Shiffman has elected to join with Mr. Gordon in conducting financial transactions related to the real estate owned by them and their wives as tenants in common under the assumed name G & S Investments he has withdrawn the records of such transactions from the privilege against compulsory production. The subpoenaed records cannot be said to be purely personal or wholly the individual records of the appellant." (A9, 10).

Because this Court has never authorized the departure from the organized institutional entity doctrine which it recently reaffirmed, and for the reasons urged below, Dr. Shiffman requests this Court to grant certiorari and to reverse the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With This Court's Decision In *Bellis* v *United States*, 417 US 85 (1974), On An Important Question Of Construction Of The Fifth Amendment And Adopts A New Rule Which Should Only Be Settled By This Court

This Court has long held that the privilege against self-incrimination applies to an individual's personal papers but not

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* The government also argued the privilege was unavailable under the doctrine of Fisher v United States, 425 US 391 (1976), and under the required records exception. The district court rejected the required records argument at the hearing, and the court of appeals did not discuss it. Neither court reached the Fisher point.

those of a "collective entity which are in his possession in a representative capacity." *Bellis* v *United States*, 417 US 85, 87, 88 (1974). This Court has reviewed several kinds of joint enterprises to determine in each instance whether the privilege may apply. This Court has always applied the facts to the standard it established. The court of appeals below, in the context of limited documents relating to a tenancy in common of one parcel of real estate, has essentially held that mere co-ownership vitiates the privilege. This Court has never sanctioned the *per se rule* and, as recently as 1974 in *Bellis*, reaffirmed the institutional entity *standard*. Under the applicable standard, the privilege applies here.

This Court first announced the institutional entity doctrine in cases denying the privilege to records of a corporation, *Wilson* v *United States*, 221 US 361 (1911), and later extended it to records of a labor union, *United States* v *White*, 322 US 694 (1944). In the latter case, this Court recognized the union's existence was "as perpetual as that of any corporation," *Id.* at 701, and that it had a formal constitution, rules, and by-laws and engaged in a broad range of activities as an independent entity.

Recently in *Bellis* this Court denied the privilege to the records of a three-partner law firm partnership upon the express central finding that the partnership had "an established institutional identity independent of its individual partners." 417 US at 95. This Court was careful to note its decision related to "the circumstances of this case," *Id.* at 95, and that the facts represented "the outer limits of the analysis. . . ." *Id.* at 94. This Court reaffirmed that collective entity analysis "presupposes the existence of an organization which is recognized as an independent entity apart from its individual members." *Id.* at 92. This Court stated that its earlier analysis in *White*, the labor union case, "of course, only makes sense in the context of what the Court described as 'organized, institutional activity.'" *Id.* at 92.

To underscore the factual standard applicable to the question, this Court in *Bellis* devoted many pages of the opinion to a catalog of the specific facts that prompted its conclusion. *Id.* at 95-99. These factors included holding out by the partnership to third parties that it was an independent institutional entity, employment of six persons, stationery on firm letterhead, business records reflecting transactions of all

employees, bank account in firm name, partnership tax return, and many legal incidents of partnership law.

This Court in *Bellis* and its predecessors could have, if it had wanted to, stated that when more than one person engages in a joint enterprise, the privilege is lost and is allowed only for the sole proprietor. This Court failed to establish such a per se rule.

This petition for certiorari represents the extreme case of joint enterprise, for it involves neither an institutional entity, nor even an entity. It is a limited purpose joint enterprise and includes only two men and their wives who are inactive. As the uncontradicted facts show, the records relate solely to owners' income from the real estate which is operated by a separate corporation whose records are not involved here, and disbursement to the mortgagee, for taxes, and to the co-owners. G & S is merely the name of a bank account established for this purpose and has no other activity. Although the government argued G & S was a partnership, the court of appeals expressly rejected that argument. (A6-7).

In these circumstances the lower courts could not and did not find an institutional entity under the factual standard established by this Court. There was no holding out to third parties, no employees, no separate tax return, and no stationery. A tenancy in common is far different from other associations in that one tenant cannot bind another, and each tenant, without the consent of any other, may convey, mortgage, or lease his undivided interest. There is no entity for any purpose of which we are aware.

The court of appeals below expressly acknowledged that any organized institutional activity here is far less than in *Bellis* (A7), which, as noted above, this Court had regarded as the "outer limits of the analysis. . . ." In order to deny the privilege, therefore, the lower courts shifted the emphasis from organized, institutional activity to notions of privacy. The court of appeals simply held that the mere creation of joint financial transactions related to the real estate created records which were not *wholly* personal, and thus the expectation of privacy was surrendered. The court of appeals said:

> "In setting up G&S Shiffman and Gordon created an entity through which the financial transactions related to the jointly owned real estate were carried out. Though there was no organized institutional activity equivalent to the usual business activity of the

> corporation or partnership, the records of G&S undeniably reflect transactions which were not wholly those of Dr. Shiffman. Also, though the appellant has an interest in the records of G&S, since Gordon has the same interest, their possession by Dr. Shiffman is in a representative capacity." (A9).

The shift from organized, collective entity to any joint ownership unduly restricts the application of the constitutional privilege. The rule below would limit the privilege to records of a sole proprietorship. But even here there is no expectation of privacy under the lower court's analysis, since usually bookkeepers, secretaries, and other employees or agents have access to the records. There is no greater expectation of privacy among such people than there is between the co-tenants here. The only application of the privilege to records would be those created and maintained by the person himself in total privacy, with the possible exception of persons between whom there is a testimonial privilege. The privilege would largely disappear with respect to records since, as a practical matter, the privilege is usually exercised with respect to business records.

This Court has never made such notions of privacy the controlling criterion on this question, although it has considered them relevant. In *Bellis* this Court said, " . . .[A] substantial claim of privacy or confidentiality cannot *often* be maintained with respect to the financial records of an organized collective entity." 417 US at 92 (emphasis added). If this Court left room for the privilege in some organized, collective entities, the privilege would certainly apply to the limited arrangement here.

This Court also approved in *Bellis* a lower court decision applying the privilege to a partnership consisting of two brothers, and in which there were many full time financial employees plus their two sons. 417 US at 101; *United States* v *Slutsky*, 352 F Supp 1105 (SDNY 1972). There was no greater expectation of privacy in that action than there is here.

CONCLUSION

Because the decision below creates an unwarranted intrusion into the Fifth Amendment privilege against self-incrimination and because it is inconsistent with the standard consistently applied by this Court, petitioner Milton Shiffman respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Sixth Circuit.

Respectfully submitted,

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June 2, 1978

No. 78-5105

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re GRAND JURY PROCEEDINGS Dr. Milton Shiffman, *Appellant.*	APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 4, 1978.

Before: PHILLIPS, Chief Judge; LIVELY and ENGEL, Circuit Judges.

LIVELY, Circuit Judge. This case presents the question of whether a tenant in common of real estate who, together with one of his co-tenants in common, has conducted the financial transactions related to the real property under an assumed name using a jointly controlled bank account, may claim the Fifth Amendment privilege against compulsory self-incrimination with respect to the records of those transactions. Dr. Milton Shiffman has perfected an expedited appeal from an order of the district court adjudging him in contempt for refusing to produce before a grand jury certain records specified in a subpoena *duces tecum*. Though Dr. Shiffman was ordered confined, upon stipulation that "it does not appear that the appeal is frivolous or taken for delay," he was admitted to bail and released upon his personal recognizance, with no restrictions as to travel, pending determination of this appeal. 28 U.S.C. § 1826 (1970).

The grand jury subpoena was directed to "Dr. Milton Shiffman or any other authorized representative of G and S

Investment." It commanded the production of "the following records of G and S Investment for the period 1972 to 1975:

(1) Cash Receipts Journal

(2) Cash Disbursements Journal

(3) Bank statements for any and all bank accounts of G and S Investment above mentioned

(4) Cancelled checks related to these bank accounts

(5) Deposit forms for deposits made to referenced bank accounts

(6) General Ledger

(7) Rental and Contractual agreements between G and S Investment and the following nursing homes:

Nightengale North Nursing Home
Nightengale East Nursing Home
Nightengale South Nursing Home
Clintonview Nursing Home
Whitmore Lake Nursing Home."

Dr. Shiffman refused to produce the subpoenaed documents and records, asserting that they would tend to incriminate him, and relying upon the Fifth Amendment guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

In support of his position Dr. Shiffman filed an affidavit which is uncontradicted in the record. The affidavit discloses that "G & S Investments" (the true designation, rather than "G and S Investment" used in the subpoena; hereafter "G&S") is the name in which he and one Hyman Gordon have maintained a bank account since 1974. The only activity of G&S is to receive income from real estate owned by

Dr. Shiffman, Hyman Gordon and their wives as tenants in common (an undivided one-third by each of the husbands and an undiveded one-sixth by each of the wives), and to disburse the income to the owners after making required payments on a mortgage, including payments to an escrow account for taxes and insurance. The affidavit states that the only purpose of G&S is to segregate the transactions relating to the real estate rentals from the individual accounts of the owners. Both Gordon and Dr. Shiffman have authority to issue checks on the G&S account. The affidavit also discloses that a certificate was filed with the county clerk of Oakland County, Michigan, that Gordon and Shiffman were transacting business under the assumed name G&S Investments. This was probably done at the request of the bank.

Though the subpoena sought copies of agreements between G&S and five nursing homes, the affidavit asserts that G&S has never had a relationship with any of the nursing homes except the Whitmore Lake Convalescent Center. This home is located on the real estate owned by the Gordons and the Shiffmans and is operated by a Michigan corporation, Whitmore Lake Convalescent Center, Inc. (Whitmore Lake). G&S collects rents from Whitmore Lake. The only evidence introduced by the government in support of its motion for enforcement of the subpoena is a certified copy of the articles of incorporation which lists Gordon and Shiffman as incorporators and members of the first board of directors of Whitmore Lake. Hyman B. Gordon was designated first resident agent of the corporation.

A trial brief of the government disclosed that the grand jury which issued the subpoena to Dr. Shiffman is investigating alleged fraudulent claims for medicare benefits by nursing homes in Michigan. In response to questions by the District Judge counsel for the government stated that no attempt had been made to subpoena copies of leases or other contracts with G&S from Whitmore Lake. Advising government counsel that he would have to use his "own resources" to get

these documents Judge Feikens ordered Shiffman to produce only the first six items listed in the subpoena. The decision to enforce the subpoena to this extent was based on a finding that ". . . when one human being throws his lot in with three other human beings, as with Mr. Gordon and the respective wives, it seems to me that he, by that action is saying, 'I am not looking for any Fifth Amendment protection as to any of this activity.'" (Oral opinion, Joint Appendix at 42).

In *United States* v. *White*, 322 U.S. 694, 697 (1944), the Supreme Court considered "the nature and scope of the constitutional privilege against self-incrimination." The issue in *White* was whether a representative of a labor union could decline to obey a subpoena *duces tecum* for certain union records on the ground of self-incrimination. Holding that "[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals," *Id.* at 698, the court ruled that the witness was not entitled to invoke the Fifth Amendment. It explained this restriction on the privilege in the following language:

> Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. *Hale* v. *Henkel*, 201 U. S. 43; *Wilson* v. *United States*, 221 U. S. 361; *Essgee Co.* v. *United States*, 262 U. S. 151. See also *United States* v. *Invader Oil Corp.*, 5 F. 2d 715. Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. *Boyd* v. *United States*, 116 U. S. 616. But individuals, when acting as representatives of a collective group, cannot be said to be exericising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by

> its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally. *Wilson* v. *United States, supra; Dreier* v. *United States*, 221 U. S. 394; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Wheeler* v. *United States*, 226 U. S. 478; *Grant* v. *United States*, 227 U. S. 74; *Essgee Co.* v. *United States, supra*. Such records and papers are not the private records of the individual members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on appropriate occasions by available legal procedures. See *Guthrie* v. *Harkness*, 199 U. S. 148, 153. They therefore embody no element of personal privacy and carry with them no claim of personal privilege.
>
> 322 U.S. at 699-700.

The union was held to represent "organized, institutional activity as contrasted with wholly individual activity." *Id.* at 701. The union had no Fifth Amendment privilege and the witness could not claim the privilege on behalf of himself either as an individual or as a union officer. Since the subpoenaed documents were held by the witness as a representative of the union he could not claim "that any part of them constituted his own private papers." *Id.* at 704.

The principles of *White* and cases cited therein were applied to the records of a three-partner law firm in *Bellis* v. *United States*, 417 U.S. 85 (1974). There a witness was commanded to produce the financial records of a law firm from which he had withdrawn as a partner. The records which were left with the remaining partners at the time of his withdrawal had been delivered to the witness a short time

before issuance of the subpoena. The Supreme Court upheld an adjudication of contempt for failure to obey the subpoena upon a finding that the records sought were those of a collective entity in the possession of the witness in a representative capacity. Even though the records of a collective entity might incriminate him personally, an individual cannot rely upon the privilege against self-incrimination to avoid producing them.

The *Bellis* court found that the rule which prevents one possessing the records of a collective entity from invoking the privilege against self-incrimination with respect to its records serves an underlying purpose of the privilege – "the protection of an individual's right to a 'private enclave where he may lead a private life.'"[1] Describing protection of individual privacy as the "major theme" of *Boyd* v. *United States*, 116 U.S. 616 (1886), the Court held that the very nature of an organized collective entity makes it impossible to sustain a claim of privacy or confidentiality with respect to its records.

The government contends that G&S is a partnership and that Shiffman is entitled to no Fifth Amendment privilege with respect to any of its records. The appellant maintains that G&S is not a partnership or any form of "organized collective entity." We conclude that G&S is not a partnership under Michigan law. Michigan has adopted the Uniform Partnership Act and Michigan Compiled Laws Annotated (M.C.L.A.) 449.7 sets forth "Rules for determining existence of a partnership." M.C.L.A. 449.7(2) provides that tenancy in common does not of itself establish a partnership, whether or not the owners share in profits from the property. Similarly M.C.L.A. 449.7 (4)(b) provides that receipt of rent by a landlord as a share of profits shall not be the basis of an inference that the landlord is a partner. See also *Moore* v. *Du-Bard*, 318 Mich. 578, 594 (1947). There is no evidence in

[1] Quoted from *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1965) (interior quotation marks omitted.) *Bellis* v. *United States*, *supra* at 91.

the record from which it could be determined that G&S is a partnership.

This does not end our inquiry, however. It is clear that a joint checking account on which two people – Gordon and Dr. Shiffman – have the authority to draw checks is maintained under the assumed name G&S Investments. The question for decision is whether Dr. Shiffman, by joining with Gordon in establishing and maintaining G&S as a medium for financial transactions related to the real estate owned by them and their wives, removed the records of such transactions from his individual "private enclave." The appellant argues that the Supreme Court did not establish a rule in *White* and *Bellis* that an individual can never claim the privilege against self-incrimination with respect to records other than those owned solely by himself. It is pointed out that in both cases the Court discussed at length various features of the entities involved – a labor union and a law partnership – which indicated substantial rights in the records of persons other than the witness. In *Bellis* emphasis was also placed on a number of indicia of a separate entity's existence, such as use of partnership stationery, telephone listing and bank account and holding itself out to the public as an established firm. Furthermore, Justice Marshall described the circumstances in *Bellis* where the witness was a former member of a three-person partnership with six employees as "the outer limits of the analysis of the Court in *White*." 417 U.S. at 94.

In cases decided by the various courts of appeals since *Bellis* the outcome appears invariably to have depended on whether the records subpoenaed related to wholly individual activity, as contrasted with organized, institutional activity. This was said to be the "key focus" of *Bellis* in *Matter of Witness Before the Grand Jury*, 546 F.2d 825, 827 (9th Cir. 1976). Though the degree of organized, institutional activity in that case was great, as opposed to that disclosed in the present case, the court's decision appears to hinge on its ulti-

mate determination that the witness had no expectation of privacy with respect to the subpoenaed records.

As in *Bellis*, the records of a law firm were the subpoenaed matter in *Matter of Grand Jury Impaneled January 21, 1975*, 529 F.2d 543 (3d Cir.), *cert. denied, sub nom Freedman* v. *United States*, 425 U.S. 992 (1976). The district court found that by agreement among the partners only the witness had access to the firm's records. Nevertheless, the court found that the partnership had an institutional identity apart from the witness-partner. The witness exclusive right of access was held to be inconsequential for purposes of the privilege which was claimed. The court stated:

> To hold that the members of an institution could resurrect the fifth amendment privilege with respect to records, that they individually forfeited by identifying themselves with that institution, would seriously erode the established principle that the privilege against self-incrimination is purely personal. 529 F.2d at 547-48. (citation omitted).

In *United States* v. *Kuta*, 518 F.2d 947 (7th Cir.), *cert. denied*, 423 U.S. 1014 (1975), the *Bellis* principles were applied to the records of a two-member law firm. In addition to noting a number of factors indicating the existence of a separate institutional entity, the court found it "equally important" that there could be no expectation of privacy with respect to the subpoenaed records. *Id.* at 953.

All of the cases just discussed have dealt with the claims of partners that they had a privilege not to produce subpoenaed partnership records. The common thread which runs through them, however, is not the existence of a formal partnership. Rather, it is the fact that each witness has joined with one or more other persons in a venture which has produced records that are not in fact his wholly individual records. In so doing the witness has surrendered any expectation of privacy with respect to the records of the venture.

The fact that Dr. Shiffman and the other tenants in common each could have collected his or her share of the rent and paid the proper share of expenses is immaterial. In setting up G&S Shiffman and Gordon created an entity through which the financial transactions related to the jointly owned real estate were carried out. Though there was no organized institutional activity equivalent to the usual business activity of the corporation or partnership, the records of G&S undeniably reflect transactions which were not wholly those of Dr. Shiffman. Also, though the appellant has an interest in the records of G&S, since Gordon has the same interest, their possession by Dr. Shiffman is in a representative capacity.

In dealing with a Fifth Amendment claim of privilege in a somewhat different setting the Second Circuit recently had occasion to review the historic underpinnings of the privilege. See *United States* v. *Beattie*, 522 F.2d 267 (2d Cir. 1975), *vacated*, 425 U.S. 967 (1976), *modified*, 541 F.2d 329 (1976). In discussing the Supreme Court's treatment of the subject in *Bellis*, Judge Friendly found that the Court had "emphasized its recent tendency to place increased reliance on privacy as the prime rationale of the privilege . . . ." 522 F.2d at 273. Quoting Justice Frankfurter, "what's not yours is not yours,"[2] the court concluded that cases denying the privilege with respect to records of entities have established the rule that "neither possession nor ownership, within or without the corporate context, can transform someone else's documents into one's own for the purpose of asserting the privilege . . . ." *Id.*

In *Bellis*, after citing *United States* v. *White*, *supra*, and a number of its other opinions denying the availability of the privilege against self-incrimination in various contexts the Court stated:

> These decisons reflect the Court's consistent view that the privilege against compulsory self-incrimination should be

[2] Quoted from *Shapiro* v. *United States*, 335 U.S. 1, 58 (1948) (Frankfurter, J., dissenting).

> "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." *United States* v. *White, supra* at 701.
>
> 417 U.S. at 89-90.

We conclude that to the extent Dr. Shiffman has elected to join with Mr. Gordon in conducting financial transactions related to the real estate owned by them and their wives as tenants in common under the assumed name G&S Investments he has withdrawn the records of such transactions from the privilege against compulsory production. The subpoenaed records cannot be said to be purely personal or wholly the individual records of the appellant.

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re: Grand Jury Subpoena

Misc. No. 78-44

Excerpt From Transcript Of
Hearing Held On February 24, 1978

* * *

THE COURT: Well, I will tell you what my difficulty is with your argument, and I am thinking about the Fifth Amendment protection to the individual. None of us have any difficulty with the need for that. It is actually mandated, and it makes good sense. But when one human being throws his lot in with three other human beings, as with Mr. Gordon and the respective wives, it seems to me that he, by that action is saying, "I am not looking for any Fifth Amendment protection as to any of this activity." And the entity of which he speaks is a tacit recognition of that fact. Why should that entity, by virtue of the fact that the individual has said that I am not looking for personal, individual protection because I am putting in with three other people — why should he then be permitted to turn around and say, "Hey, wait a minute. This is not an entity that you can attack with a subpoena. I demand my Fifth Amendment rights."

That's my problem with your argument, when you get right down to it.

* * *

THE COURT: . . . I will enforce the subpoena in regard to the canceled checks and the ledgers that you seek, and the bank statements. You will have to use your own resources to get the contract from the convalescent home.

You may prepare an Order.

MR. HAVILAND: Thank you, Your Honor.

MR. ALTERMAN: Your Honor, when you enforce the subpoena as you have just indicated, is that by finding that G & S is an entity within Bellis? Is that your position?

THE COURT: I don't think I have to say that. Yes, in this sense it is an entity. For the purpose of enforcing this subpoena, I am finding it is an entity within Bellis.

Transcript pp 26, 33-34;
Court of Appeals Joint
Appendix pp 42, 49-50

Supreme Court, U.S.
FILED
JUL 28 1978
MICHAEL RODAK, JR., CLERK

No. 77-1728

In the Supreme Court of the United States

OCTOBER TERM, 1978

MILTON SHIFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1978. The petition for a writ of certiorari was filed on June 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the privilege against compulsory self-incrimination excuses petitioner, a tenant in common of real estate, from compliance with a grand jury subpoena to produce records of the tenancy in common.

STATEMENT

While conducting an investigation of Medicaid fraud, a grand jury sitting in the United States District Court for the Eastern District of Michigan issued a subpoena *duces tecum* for certain financial records of "G&S Investments."[1] In response to the subpoena, petitioner appeared before the grand jury, but he asserted the privilege against compulsory self-incrimination and did not produce the subpoenaed documents. Thereafter, following a hearing in district court, petitioner was ordered to reappear before the grand jury and to bring the requested documents.[2] Again petitioner appeared, but again he refused to produce the documents. Petitioner was then adjudged in contempt of court and ordered confined until he produced the records. The court of appeals affirmed the contempt order (Pet. App. 1-10).

According to an affidavit filed by petitioner in district court,[3] petitioner and Hyman Gordon filed a certificate with the county clerk of Oakland County, Michigan, stating that they were transacting business under the assumed name of "G&S Investments." They also opened a

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[1]The following documents were subpoenaed: (1) the G&S Investments cash receipts journal; (2) the G&S Investments cash disbursements journal; (3) bank statements for any and all bank accounts of G&S Investments; (4) cancelled checks relating to those bank accounts; (5) deposit forms for deposits made to those bank accounts; (6) the G&S Investments general ledger; and (7) rental and contractual agreements between G&S Investments and five nursing homes (Pet. App. 2).

[2]The district court ordered petitioner to deliver to the grand jury all subpoenaed documents except the contractual agreements between G&S Investments and the nursing homes.

[3]Petitioner's affidavit (C.A. App. 7-10) is the only account of his relationship to G&S Investments in the record. No testimony was offered by either party at the district court hearing held to determine whether petitioner must comply with the subpoena.

bank account under that name, depositing in it the rental income from real estate in Whitmore Lake, Michigan, in which each owned an undivided 1/3 interest and in which their wives each owned an undivided 1/6 interest. Both petitioner and Gordon are authorized to withdraw from the bank account for the limited purpose of making mortgage and related payments on the Whitmore Lake real estate and to pay income derived from the property to the four tenants in common (Pet. App. 2-3).

ARGUMENT

Petitioner contends that the privilege against compulsory self-incrimination protects against his compelled production of the financial records of G&S Investments. He contends that the papers of G&S Investments are in fact his personal papers, not the papers of an independent business entity. This Court has rejected similar Fifth Amendment claims where the subpoenaed documents were corporate records (*Wilson* v. *United States*, 221 U.S. 361, 380-386), labor union records (*United States* v. *White*, 322 U.S. 694, 700), and partnership records (*Bellis* v. *United States*, 417 U.S. 85), and the same analysis applies here.

The Court in *Bellis* defined the scope of the privilege as follows (417 U.S. at 87-88):

> The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life.
>
> * * * * *
>
> On the other hand * * * an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally.

The inapplicability of the privilege to business entities stems from the particularly personal nature of the privilege against compulsory self-incrimination (*id.* at 89-90):

> These decisions reflect the Court's consistent view that the privilege against compulsory self-incrimination should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." *United States* v. *White, supra,* at 701.

The records of G&S Investments were not petitioner's personal records; they were equally accessible to Gordon and apparently also to both wives. G&S Investments was established as an independent entity specifically to conduct a particular kind of business on behalf of its four principals. Accordingly, whether or not it is technically a partnership under Michigan law, it is nonetheless a "collective entity" established for engaging in a joint business venture, and its records are for that reason outside the protection of the Fifth Amendment privilege. *United States* v. *Hankins,* 565 F. 2d 1344 (C.A. 5) (partnership documents in possession of sole surviving partner are still documents of the "entity" and must be produced over partner's Fifth Amendment objection); *United States* v. *Kuta,* 518 F. 2d 947 (C.A. 7), certiorari denied, 423 U.S. 1014 (documents of two-man partnership must be produced); *United States* v. *Mahady & Mahady,* 512 F. 2d 521 (C.A. 3) (documents of small family partnership must be produced); *Reamer* v. *Beall,* 506 F. 2d 1345 (C.A. 4), certiorari denied, 420 U.S. 955 documents of one-man professional corporation must be produced, even though professional corporation does not possess all attributes of ordinary business corporation).[4]

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[4]Even if the documents in question in this case were deemed petitioner's personal property, they would not necessarily be protected from mandatory disclosure. Subpoenaed documents that are not testimonial in nature must be produced unless the act of producing them would itself be both testimonial and incriminating. *Fisher* v. *United States,* 425 U.S. 391, 408. Many of the documents involved in this case were prepared by the bank or were voluntarily conveyed to the bank. As to such documents, here, as in *Fisher,* the government "is in no way relying on the 'truthtelling' of [petitioner] to prove the existence of or his access to the documents. * * * The existence and location of the papers are a foregone conclusion and [petitioner] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers" (425 U.S. at 411). Under these circumstances, " 'no constitutional rights are touched. The question is not of testimony but of surrender' " (*ibid.,* quoting *In re Harris,* 221 U.S. 274, 279).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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